ALTS
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

July 22, 2004

The Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WCB Docket Nos. 96-98, 98-147, 01-338

Dear Chairman Powell:

The Association for Local Telecommunications Services (ALTS) writes this letter for two purposes:

1) to the ask the Commission not to impose cost increases, or permit denial of access, for transmission facilities while the Commission works to adopt permanent UNE rules; and
2) to respond to the misleading and incorrect pleading by Verizon alleging that high-cap loop UNEs were vacated and are otherwise unnecessary to local telephone competitors.

First, ALTS appreciates the FCC's effort to protect consumers and competitors from the rate shock that could occur if CLECs were unable to continue to purchase UNEs while the FCC develops new UNE rules. The FCC and NTIA deserve credit for recognizing the extremely harmful impact to consumers if the RBOCs were allowed to charge monopoly rents for access to their networks. Nevertheless, ALTS is extremely concerned about reports that the FCC may permit these consumer protections to expire after six months, whether or not the FCC has adopted new rules by that point. ALTS is further alarmed by proposals that CLECs would face arbitrary price increases of 15% for embedded circuits, and up to retail special access rates for new circuits. Such price increases could be devastating to local telecom competition and are unjustified by the record before the Commission.

If the FCC is not able to extend the standstill order to vacated UNEs until the new rules take effect, we strongly urge the FCC simply to remain silent as to the treatment of the pricing for these elements at the end of six months. We cannot overstate the harm to facilities-based CLECs of the price increases under consideration. The 15% price increases for embedded circuits, and the retail special access prices for new circuits, could force CLECs to withdraw from markets, cancel their planned initial public offerings, or go into bankruptcy. The consequences could be irreversible for many consumers and companies, and perversely targets those facilities-based companies who

embody the Commission's vision of competition. It would be a shame for the FCC to force companies to liquidate solely because the FCC failed to complete its work in six months, particularly when the case for retaining DS1 loops, dark fiber, and transport links as UNEs is so overwhelming. If the Commission wishes to consider additional transitional measures at the end of the standstill period, it can simply solicit additional comment on what those mechanisms should look like, and then act at the end of six months if necessary. The Commission should not, however, act now to impose drastic price increases in the hypothetical chance that the Commission may not finish its work in six months.

The FCC should, instead, ensure that the status quo for all vacated UNEs does not expire before an FCC order adopting new UNE rules takes effect. This is the best way to ensure that consumers are protected against rate shock and arbitrary price increases. If the FCC is nevertheless determined to end the standstill period for some UNEs after six months, the FCC should, at minimum, recognize that it is highly likely that the Commission will confirm its existing high-capacity loop unbundling rules when it completes its proceeding on remand. As to DS-1 loops in particular, the unanimous holding of the Commission – undisturbed by the D.C. Circuit – that carriers are impaired without access to such loops can be readily readopted by the Commission.[1] It would be counterintuitive for the Commission to cut off access to high-capacity loops, or permit massive price increases for access, given the likelihood that the Commission will maintain its rules requiring unbundled access to such loops.

As to the Verizon pleading, on July 19, 2004, Verizon wrote to you urging the Commission to immediately eliminate unbundled, cost-based access to high-capacity transmission facilities. Verizon first sets out its (incorrect) argument that high-capacity facilities were vacated by the D.C. Circuit's decision in *Verizon v. FCC*. Second, Verizon repeats its claims to you that unbundled access to high-capacity facilities is unnecessary, because the nation's small businesses derive no benefit from competitive service offerings, and competitive carriers can in any event simply use special access retail services as a substitute for unbundled network elements. ALTS writes to respond to both of these arguments.

First, Verizon argues in its letter to you that the D.C. Circuit decision in *Verizon v. FCC* vacated the Commission's high-capacity loop rules. Specifically, Verizon claims:

> In reality, the Court vacated the unbundling requirements for *all* high-capacity transport facilities, which it used as a generic term that it expressly defined to include any high-capacity "transmission facilities dedicated to a single customer or carrier" – a definition that includes both high-capacity loops and transport. *USTA II*, 359 F.3d 554, 573 (D.C. Cir. 2004).[2]

[1] Triennial Review Order at para. 325.

[2] Letter dated July 19, 2004, fom Michael Glover, Senior Vice President and Deputy General Counsel, Verizon, the Chairman Michael Powell, FCC, at 2 (Verizon Glover Letter).

Verizon's citation to the court's opinion actually confirms that the decision is limited to interoffice transport and did not involve high-capacity loops. The quotation from the *USTA II* decision cited by Verizon ("transmission facilities dedicated to a single customer or carrier") is taken directly by the Court from the FCC's definition of interoffice transport in the Triennial Review Order:

> "Dedicated interoffice transmission facilities (transport) are facilities dedicated to a particular customer or competitive carrier that it uses for transmission among incumbent LEC central offices and tandem offices."[3]

Thus, the D.C. Circuit plainly intended its vacatur to apply only to dedicated interoffice transport – the court defined the parameters of its discussion by quoting directly from the FCC's definition of interoffice transport. The court did not include in its discussion any mention of high-capacity facilities, and indeed defined its terms by quoting directly the FCC's definition of interoffice transport, not loops. No amount of Verizon wordsmithing can alter this clear holding.

Verizon also argues that "[t]he Court also vacated all "portions of the order that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements."[4] But Verizon again ignores the clear language in the Triennial Review Order upon which the D.C. Circuit based its decision. As the Commission concluded in its discussion of high-capacity loops, "[b]ecause the record does not demonstrate that carriers can economically self-provision at the DS-1 level, we do not delegate to the states the authority to consider DS1 loop impairment on a location-specific basis based on a self-provisioning trigger."[5] Because the D.C. Circuit found the delegation to states of authority to implement the self-provisioning trigger for interoffice transport to be defective, the court vacated the Commission's interoffice transport decision. At the same time, because the Commission specifically refused to delegate the self-provisioning trigger to the states for high-capacity DS1 loops, the D.C. Circuit decision could not have vacated the Commission's disposition of such loops.

In short, Verizon attempts to expand the D.C. Circuit's limited holding in an effort to prevent the Commission from preserving access to high-capacity loop facilities in the short period necessary for the Commission to develop permanent rules to implement the market-opening provisions of the 1996 Act. ALTS cautions the Commission to avoid endorsing Verizon's erroneous view of the D.C. Circuit decision – the D.C. Circuit did not vacate the Commission's high-capacity loop rules. Published accounts suggest that the Commission is considering punishing facilities-based carriers, by imposing higher rates on existing customers and denying access for new customers, if the Commission fails to complete new unbundling rules within six months – a supreme irony given the Commission's stated dedication to promoting facilities-based competition. If the Commission is unwilling to take an express position on the exact parameters of the D.C. Circuit's decision, it should certainly not tacitly endorse Verizon's

[3] Triennial Review Order, FCC 03-36, at para. 361.
[4] Verizon Glover Letter at 2.
[5] Triennial Review Order at para. 327.

view by expressly imposing price increases on carriers that use high-capacity facilities, and expressly cutting off access to such facilities, as part of the Commission's efforts to prevent marketplace disruption during the pendency of its rulemaking proceeding. Put another way, if the Commission does not wish to pronounce the status of high-capacity facilities in the wake of the D.C. Circuit decision, it should certainly not expressly subject providers of such facilities to price increases and cessation of service as part of an interim regime purporting to apply only to those network elements expressly vacated by the D.C. Circuit.

Next, Verizon makes two fallacious arguments against continued unbundling of bottleneck incumbent transmission facilities. First, Verizon argues that the nation's small businesses derive no benefit from the competition made possible by unbundling of transmission facilities. Second, Verizon argues that competitive carriers are using special access services as alternatives to unbundled network elements, and thus unbundled access to transmission facilities is no longer necessary. As competitive carriers that serve the small business marketplace have already informed you, continued access to cost-based transmission facilities is vitally important to the nation's small businesses, and Verizon is flat wrong when it claims that small businesses and the carriers that serve them will survive without such unbundling.

As to Verizon's first argument, that small businesses derive no benefits from competition in the telecommunications marketplace, no less an authority that the federal government's Small Business Administration takes the opposite informed view. Specifically, in its March 2004 report on small business telecommunications use, U.S. SBA found that 22% of the nation's small businesses currently subscribe to CLEC telecommunications services.[6] Moreover, a recent economic study sponsored by ALTS member NuVox found that having to replace DS1 UNE loops and EELs with special access services would increase carrier costs by more than 100% on average, and, as a result, would cost small businesses $4.9 billion annually.[7] As that study concluded, "[e]limination of UNE DS1 loops and transport would deal a staggering blow to nascent facilities-based competition, crippling the competitive carriers who supply DS-1 services to small and medium-sized businesses." ALTS members are using DS-1 loops across the country to provide innovative new services, particularly Voice over Internet Protocol (VoIP) suites of business-class services, which are vitally important to the productivity and efficiency of small businesses. In the absence of unbundled access to DS-1 loops, competitive carriers will be unable to offer such VoIP services, leaving small businesses without the technical innovation they need to compete.

As to Verizon's second argument, Verizon conflates irrelevant facts into an unsupported conclusion. ALTS has already detailed the fundamental flaws in the

[6] "A Survey of Small Businesses' Telecommunications Use and Spending," Small Business Administration Office of Advocacy, March 2004, at ii.

[7] The Economic Impact of the Elimination of DS-1 Loops and Transport as Unbundled Network Elements, Microeconomic Consulting and Research Associates, Inc. (MiCRA), June 29, 2004. The study was undertaken and sponsored by CompTel/ASCENT and Nuvox Communications. ALTS wholly endorses and support the conclusions reached in this important study.

assumptions underlying Verizon's claims, and repeats them only briefly here.[8] First, it is only true that "competitive carriers" overwhelmingly use special access if the universe of competitive carriers under consideration is limited to the nation's largest interexchange carriers. As Verizon noted in its prior filing, AT&T, MCI, and Sprint "have dominated the provision of high-capacity services to large enterprise customers who make up the bulk of retail demand for these services – for Verizon, more than 85 percent of its sales to end-user business customers."[9] For example, Verizon cites as evidence to support its claim an affidavit from AT&T stating that "98% of AT&T's DS1 customer loops/EELs are leased from ILECs under their Special Access tariffs; only 2 percent are leased as UNEs."[10] Because the FCC's EEL usage restrictions bar AT&T from using EELs to provide long distance services, and because AT&T (as noted by Verizon) serves principally large business customers, it is not surprising that AT&T uses special access services. It is, however, irrelevant to the question of whether competitive carriers seeking to serve small businesses are impaired without access to unbundled transmission facilities.

For these reasons, ALTS again urges the Commission to follow through on its commitment to facilities-based competition by taking the necessary steps to ensure continued unbundled access to high-capacity transmission facilities.

Respectfully submitted,

John Windhausen, Jr.
President
ALTS

cc:
FCC Commissioners and Legal Advisors
Wireline Competition Bureau staff
NTIA Administrator Michael Gallagher and Meredith Attwell

[8] *See* Letter dated July 7, 2004, from John Windhausen, Jr., President, ALTS, to Chairman Michael Powell, FCC, WCB Docket Nos. 96-98, 98-147, and 01-338.
[9] Verizon ex parte, WCB Docket Nos. 96-98, 98-147, 01-338, "Competing Providers are Successfully Providing High-Capacity Services to Customers Without Using Unbundled Elements," filed July 1, 2004, at 2.
[10] Verizon ex parte at 19, quoting Ex Parte Letter from Joan Marsh, AT&T, to Marlene Dortch, FCC, CC Docket Nos. 01-338, 98-147, 96-98 (Oct. 2, 2002).